Supreme Court, U.S.
FILED
FEB 10 2005
OFFICE OF THE CLERK

No. 04-041092

IN THE

Supreme Court of the United States

S.E.W. FRIEL, a Maryland General Partnership and
FRIEL LUMBER COMPANY, a Maryland General Partnership,

Petitioners,

v.

MARYLAND STATE ROADS COMMISSION and
THE MARYLAND STATE HIGHWAY ADMINISTRATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI

MICHAEL R. FOSTER
FOSTER, BRADEN, THOMPSON
& PALMER, LLP
102 E. Main Street
Suite 203
Stevensville, Maryland 21666
(410) 643-4000

Attorneys for Petitioners

192673

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

When the State of Maryland prepared to build a highway from the Chesapeake Bay Bridge to Delaware, it required six acres of Petitioners' land. Instead of paying money for the land, the State agreed to build Petitioners a macadam road across the new highway. This permitted Petitioners, and their customers continued access to their cannery and lumber yard.

One question is presented:

1. Did these improvements and access constitute a property right of the Petitioners, so that fifty years later, when the State removed the road and the access, over Petitioners' objections, they were entitled to compensation?

LIST OF PARTIES

The Petitioners are S.E.W. Friel, a Maryland General Partnership and Friel Lumber Company, a Maryland General Partnership. The Respondents are the Maryland State Roads Commission and the Maryland State Highway Administration. Parker F. Williams, the Maryland State Highway Administrator, and Robert Lindsey, District Engineer for the Maryland State Highway Administration, the two individual Respondents who were employees of the State of Maryland, were dismissed by the trial court. Petitioners do not take issue with that dismissal.

CORPORATE DISCLOSURE STATEMENT

All Defendants are part of the Maryland State government. The Plaintiffs are Maryland partnerships. The general partners in 1950 were S.E.W. Friel and James R. Friel, both are deceased. The present general partners are James R. Friel, Jr., James R. Friel, III and Robert U. Friel.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	vii
Opinion Below	1
Statement of Jurisdiction	1
Statement of the Case	1
Reasons for Granting the Petition	5
I. Review Is Warranted To Resolve A Conflict Concerning The Application Of The Fifth Amendment Of The Constitution To A State's Taking Of Private Property Interests	5
a. The Fifth Amendment guarantees that a private property owner shall receive just compensation for any property taken by the State	5

Contents

Page

II. Review Is Warranted To Decide An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court 7

a. A State's action to "take back" the consideration previously paid to the Petitioners in a condemnation matter, some fifty years after its tender, constitutes a taking requiring just compensation pursuant to the Fifth Amendment 7

Conclusion 9

TABLE OF CITED AUTHORITIES

Page

Cases:

Armstrong v. United States,
364 U.S. 40 (1960) 5

Chicago, B. & Q. R. Co. v. Chicago,
166 U.S. 226 (1897) 5

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,
482 U.S. 304 (1987) 5

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) 6

Shoshone Tribe v. United States,
299 U.S. 476 (1937) 7

United States v. Cherokee Nation of Oklahoma,
480 U.S. 700 (1987) 7

United States v. Clarke,
445 U.S. 253 (1980) 6

United States v. Klamath Indians,
304 U.S. 119 (1938) 7

United States v. Sioux Nation of Indians,
448 U.S. 371 (1980) 7, 8

United States v. Tillamooks,
341 U.S. 48 (1951) 7

Cited Authorities

Page

Constitutional and Statutory Provisions:

U.S. Const. amend. V 5, 6, 7

U.S. Const. amend. XIV 5

28 U.S.C. § 1257(a) 1

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The Court Of Special Appeals Of Maryland Filed August 5, 2004 .... 1a

Appendix B — Memorandum Of The Circuit Court For Queen Anne's County Dated June 18, 2003 .. 21a

Appendix C — Order Of The Court Of Appeals Of Maryland Denying Petition And Supplement Dated November 12, 2004 ..... 41a

OPINION BELOW

Both the opinion of the Circuit Court for Queen Anne's County, Maryland and of the Court of Special Appeals of Maryland are unreported and set forth in the appendix.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

On June 18, 2003, The Circuit Court for Queen Anne's County, Maryland, entered an Opinion and Order denying Petitioner compensation for the " taking" described in the Statement of the Case, a copy thereof is contained in the appendix.

On August 5, 2004, the Court of Special Appeals of Maryland filed a Slip Opinion affirming the Circuit Court with the same reasoning, a copy thereof is contained in the appendix.

On November 12, 2004, the Maryland Court of Appeals entered an Order denying the petition for certiorari, a copy thereof is contained in the appendix.

STATEMENT OF THE CASE

Petitioners are the owners of a cannery and lumber yard, located upon land abutting both sides of a divided highway in Maryland. Prior to 1950, Petitioners gained access between the Town of Queenstown and their plants over two strips of land they purchased for that purpose. These strips led to a paved State highway and into the center of Queenstown.

In 1950, Petitioners entered into an agreement with the Town of Queenstown to convey the two strips of land running from Petitioners' plants to the above mentioned State road. In exchange, the Town agreed to construct and maintain a Town road between the plants and the State road. The deed for the land provided that in the event the Town failed to maintain this land as a public road, the land reverted to Petitioners.

About the time the road was completed, the State decided to construct a divided highway from the Chesapeake Bay Bridge to the Delaware State line. In the area of Queenstown, this highway would pass between Petitioners' plant entrance and the above mentioned State road. It would be necessary for the State to acquire a two hundred foot strip of Petitioners' land to construct the highway.

The highway was designed so as to have limited vehicular access. This meant that vehicles would be able to cross the highway at major intersections, but not in between. Under the original design, Petitioners would no longer be able to drive over the new road into Town.

When representatives of the State approached Petitioners to attempt to negotiate the purchase of the two hundred foot strip of land, prior to formal condemnation, the parties reached an agreement. Petitioners would deed the strip to the State for the highway. In exchange, the State would redesign the highway creating on and off highway access points on both sides of the highway at the entrance to Petitioners' plants and have the road contractor construct a macadam roadway between the northbound and the southbound lanes, at State expense. The original design called for a grass median between the lanes of the highway at

Petitioners' plant entrance. The purpose of this grass median was to eliminate vehicular crossings between intersections.

Under the agreement with the State, with the highway redesigned, Petitioners would be able to continue to enter and exit their plants at the entrance thereto, and use the macadam road over the median, to cross the highway and get into Town. Simply put, the State agreed to create a highway intersection at Petitioners' plant.

The agreement between Petitioners and the State for the creation and construction of the intersection was reduced to writing and executed by both parties. The original State Highway Plats were redesigned to reflect the new access points onto the highway and the macadam crossover running between the highway lanes at Petitioners' plant entrance.

As with all State Highway Plats, the redesigned plats were recorded among the Queen Anne's County, Maryland Land Records. These permanent records clearly reflected the agreement of the parties, i.e., the highway at the entrance to Petitioners' plants permits on and off access and contains a road to cross the highway and drive into Town.

When the highway was completed, the individual Petitioners executed a deed which had been prepared by attorneys for the State. At no time were Petitioners represented by counsel. The deed was in a standard form used by the State to acquire land for highway construction. The standard form deed expressly states the Grantor is releasing any and all rights to access the highway from the retained lands. The deed executed by Petitioners had the release of access language modified, and it expressly provided that Petitioners were not releasing their access rights at the location of the new crossover, but were retaining those rights.

From when the highway opened in the early 1950's until shortly before suit was filed, Petitioners, their customers and employees, and the public in general traveled freely between Petitioners' plants and the Town of Queenstown via the access points and the macadam crossover. In 2002, the State informed Petitioners that the macadam crossover would be eliminated, and access from Petitioners' plants to Queenstown, via the crossover, would no longer be possible. Petitioners employed counsel to attempt to stop the crossover closing; and when that failed, to discuss compensation to permit Petitioners to relocate their plants. The State refused to discuss either.

Left with no alternative, Petitioners filed suit in the Circuit Court for Queen Anne's County, Maryland requesting injunctive relief to block the closing of the crossover, and in the alternative, compensation for the taking as provided by both the United States and Maryland Constitutions. The trial court denied the request for an injunction and dismissed the Complaint, holding that the Petitioners had no property rights in the crossover. The Court of Special Appeals of Maryland affirmed the trial Court. Upon Petition, the Court of Appeals of Maryland declined to issue a writ of certiorari; this Petition followed.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted To Resolve A Conflict Concerning The Application Of The Fifth Amendment Of The Constitution To A State's Taking Of Private Property Interests

a. The Fifth Amendment guarantees that a private property owner shall receive just compensation for any property taken by the State

The Fifth Amendment provides, in relevant part, that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *See generally Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). This Court has stated simply that the . . .

> . . . basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation."

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304, 315 (1987) (*quoting Armstrong v. United States*, 364 U.S. 40, 49 (1960)) (emphasis in original).

A taking may be effected by either (1) the commencement of ". . . a judicial proceeding instituted for the purpose of acquiring title to private property[,]" or (2) the State's "physical intrusion" of private property to the detriment or exclusion of its owner. *United States v. Clarke*, 445 U.S. 253, 254-55 (1980). Regardless of the means utilized, the State is never permitted to achieve the desired taking ". . . by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

In 1952, the Petitioners, pursuant to a State highway acquisition proceeding, reached an agreement with the State regarding the compensation to be paid for the Petitioners' property. That compensation, as set forth in a written agreement, depicted in a revised plat, and expressed in a recorded deed, included the construction of access points and a macadam crossover, by the State, for the benefit of the Petitioners. In 2002, the State, by means of physical intrusion and without commencing a judicial proceeding, removed the crossover and permanently denied the Petitioners any further use of the same.

By affirming the trial court and holding that the foregoing did not constitute a taking, the Court of Special Appeals of Maryland embarked on a path contrary to this Court's interpretation of the Fifth Amendment. The Court of Special Appeals of Maryland has declined to require just compensation for a cognizable property interest, thus paving the way for the State to extinguish similar, decades old interests acquired during rapid expansion of our present highway system, thus presenting a substantial constitutional issue justifying Supreme Court review.

II. Review Is Warranted To Decide An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

a. A State's action to "take back" the consideration previously paid to the Petitioners in a condemnation matter, some fifty years after its tender, constitutes a taking requiring just compensation pursuant to the Fifth Amendment

A similar argument has been addressed by this Court in cases involving government action affecting property of Native Americans. *See generally, United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *United States v. Tillamooks*, 341 U.S. 48 (1951); *United States v. Klamath Indians*, 304 U.S. 119 (1938); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937).

In *Sioux Nation of Indians*, the Sioux Tribe negotiated and signed the Fort Laramie Treaty of April 29, 1868. *Sioux Nation of Indians*, 448 U.S. at 374. The relevant terms of that treaty required the United States to pledge "that the Great Sioux Reservation, including the Black Hills, would be set apart for the absolute and undisturbed use and occupation of the [Sioux Tribe]." *Id.* at 375. In return, the Sioux Tribe agreed to "withdraw all opposition" to the construction of railroads, military posts and roads, and to forego any further attacks on settlers. *Id.* at 375-76.

In 1874, following six years of relative tranquility between the parties to the Laramie Treaty, gold was discovered in the Black Hills. *Id.* at 376. Recognizing the value of the mineral rights, the United States abrogated the

Laramie Treaty by means of a new "agreement" whereby the Sioux Tribe relinquished its rights to the Black Hills in return for government-issued food rations. *Id.* at 382-83.

In determining that the Sioux Tribe was vested with property rights subject to a taking, and that the food rations did not constitute "just compensation" for those rights, this Court stated:

> [the return of the Black Hills] effected a taking of tribal property, property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868. That taking implied an obligation on the part of the Government to make just compensation to the Sioux Nation, and that obligation, including an award of interest, must now, at last, be paid.

Id. at 424.

Outside the realm of the forementioned cases, this Court has not decided the important federal question of whether the consideration paid pursuant to the exercise of a State's power of eminent domain may become the subject of a subsequent taking.

In *Sioux Nation of Indians*, a carefully negotiated agreement between the parties vested the Sioux Tribe with certain property rights. Subsequently, the United States "took back" a portion of those property rights without compensating the Tribe. In the present case, the Petitioners and the State carefully negotiated an agreement which permitted the Petitioners to retain certain rights in the condemned property. Fifty years later, the State "took back" those rights and refused to compensate the Petitioners.

While these cases are certainly analogous, the latter exists without the benefit of a Supreme Court opinion that squarely addresses its facts. Resolution of this federal question is important, is in the public's interest, and will clarify the constitutional rights and obligations existing between private citizens and government in the area of highway land acquisition.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

MICHAEL R. FOSTER
FOSTER, BRADEN, THOMPSON
& PALMER, LLP
102 E. Main Street
Suite 203
Stevensville, Maryland 21666
(410) 643-4000

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE COURT OF SPECIAL APPEALS OF MARYLAND FILED AUGUST 5, 2004

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 1096

September Term, 2003

S.E.W. FRIEL, et al.

v.

STATE ROADS COMMISSION, et al.

Krauser,
Barbera,
Bloom, Theodore G.,
(Retired, specially assigned)

JJ.

Opinion by Barbera, J.

Filed: August 5, 2004

In this case, we are asked to determine whether the Circuit Court for Queen Anne's County properly denied injunctive relief to appellants, S.E.W. Friel and Friel Lumber Company, two family-run Maryland general partnerships. Appellants filed an eight-count complaint against appellee,

the State Highway Administration.[1] The complaint sought to enjoin further action on a proposed highway improvement project on Route 301 in Queenstown, Maryland. Appellants asserted, in particular, that the SHA's proposal to remove the Melvin Avenue cross-over on Route 301 would adversely affect their business operations on the south side of Route 301.

Following a one-day trial, the court entered a declaratory judgment, declaring that appellants were not entitled to any form of relief because they had no property rights in the Melvin Avenue cross-over.

Appellants raise the following issues on appeal, which we set forth as they appear in appellant's brief:

> I. After the Maryland State Roads Commission and Appellants carefully negotiated an agreement for the SRC to construct a crossover and connect it with access points on both sides of Route 301, which terms were made part of a written agreement, executed by both parties, thereafter depicted on a plat, which plat was adopted in a deed by reference and both recorded, did Appellant[s] possess an identifiable property right?

---

1. The case was captioned at the trial level "*S.E.W. Friel, et al. v. The State Roads Commission, et al.*" The State Roads Commission became the State Highway Administration prior to the filing of this suit, so we here refer to appellee in its current designation.

Appendix A

II. Where Appellants deeded a strip of land to a municipality for construction of a road, with a reverter clause which stated the strip reverted to Appellants if the road was abandoned or discontinued, generally, or not maintained by the °Town", under circumstances where the municipal road and a State highway were designed and constructed under a common scheme, did the right to commence an action for the recovery of the land occur when both roadways opened for traffic and, arguably, the crossover portion was thereafter maintained by the State?

Because we answer "nc" to the first question, we need not reach the second issue. We affirm the judgment of the circuit court.

FACTS AND LEGAL PROCEEDINGS

In his last will and testament, executed in 1941, S.E.W. Friel bequeathed his one-third interest in Friel Lumber Company and the family canning operation to his sons, S.E.W. Friel, Jr. and James R. Friel ("the Friels").[2] The will also devised to the sons real property in Queenstown, Maryland, where the family businesses were located.

The Friels' property was separated from the Town of Queenstown by a right of way of the Baltimore and Eastern

2. In this opinion, we distinguish the Friels from appellants, the two Friel businesses that are parties to the instant suit.

Railroad Company. The Friels owned the property south of the railroad right of way by virtue of their father's will. All of the business operations were located on this parcel of land. In 1942, the Friels purchased, by two deeds, some property north of the railroad right of way.

In an Indenture of Dedication ("Indenture"), dated July 7, 1950, the Friels conveyed a 30-foot strip and an adjoining 50-foot strip of land to the Town of Queenstown for one dollar "for the purposes of a public street and/or highway for the use of the public." The two strips of land extended from Route 456 (now known as Del Rhodes Avenue) to the railroad right of way.

The Indenture was recorded among the Queen Anne's County Land Records. It contained the following provision: "If said dedicated street and/or highway is abandoned or discontinued in whole or in part or ceases to be a Town maintained street and/or highway, it shall revert to the parties of the first [the Friels] or their estate or their heirs." We hereafter shall refer to this provision as the "right of reverter."

The Indenture also declared that the town "accept[ed] said conveyance and dedication for the use of the public, and, in consideration thereof, covenant[ed] and agree[d] that it will lay out, grade, construct and maintain a good and sufficient street." The street was constructed by the Town and was named Melvin Avenue.

At about the same time that the Friels executed the Indenture, the Maryland State Roads Commission ("SRC") began acquiring land to construct Route 301, in order to

connect the Chesapeake Bay Bridge to the Delaware state line. On July 20, 1950, the Friels entered into an option contract with the SRC, in which they agreed to convey land to the SRC for the purpose of constructing Route 301. On August 2, 1950, the SRC executed a "Notice-Acceptance of Option," in which the SRC exercised its option to acquire from the Friels "the land, easements and rights as shown on Plat Numbers 8308, revised 3/29/50, 8309, 8310, revised 6/12/50, 8317 and 8318." Plat 8309 was subsequently revised and substituted with plat 9430. Both plats depict the intersection of Melvin Avenue and Route 301.

The Notice-Acceptance of Option stated that the option contained the following provision:

> "ANY AND ALL RIGHT WHATSOEVER of the GRANTORS, their heirs, successors and assigns, to enter the Through Highway, lying between the lines designated "Right of Way Line of Through Highway" except by Melvin Avenue from their remaining property; all to the end that there never will be any vehicular, pedestrian and/or animal access to said Through Highway, except by Melvin Avenue or except by means of such public road connections as the Commission may construct, or permit to be constructed."

The Notice-Acceptance of Option also stated that the SRC understood and agreed to the following:

> The existing Melvin Avenue located within the limits of the town of Queenstown ... is to be

> connected to the proposed road metal and a standard cross-over is to be built at the said connection; on the right opposite the said crossover a street and or road connection is to be made from the proposed road metal to the Railroad's property. The proposed connections to be built on the left and right of the proposed road metal are to be graded and surfaced in accordance with S.R.C. specifications for street and or road connections for this particular contract; it being definitely understood and agreed that the connection on the right is to toe out before reaching the tracks (main line and siding) on the Railroad's property.

The Friels did not execute the deed to the SRC until August 15, 1952. This was apparently due to protracted disputes arising from property to be conveyed to the Friels by third parties as a condition of the Friels' option contract. The SRC encountered difficulties in securing the conveyances from three landowners after the Friels and the SRC entered into the agreement.[3]

---

3. The Friels negotiated with SRC to procure property in lieu of monetary consideration for the conveyance of their property to the SRC. Specifically, the Friels secured conveyances, from third parties who owned land adjacent to the Friels, of the remnant parcels of land that were created as a result of the Route 301 highway project. The Friels intended to use that land for a parking lot for their businesses. In addition to acquiring the third party conveyances, the Friels included provisions in the option contract whereby the SRC agreed to: (1) pave the Melvin Avenue cross-over; (2) cut all trees removed from the construction areas into designated lengths and pile

(Cont'd)

Appendix A

The deed, filed among the Queen Anne's County Land Records on September 17, 1952 ("1952 deed"), stated in Paragraph 3:

> NOW, THEREFORE, THIS DEED AND RELEASE WITNESSETH: That for and in consideration of the above premises, One Dollar ($1.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged, we do hereby grant and convey unto the State of Maryland, to the use of the State Roads Commission of Maryland, it[s] successors and assigns, forever in fee simple, all our right, title and interest, free and clear of all liens and encumbrances, in and to the land, together with the appurtenances thereto belonging, or in anywise appertaining, lying between the lines designated "Right of Way Line of Through Highway", and also between lines designated "right of way line" as shown and/or indicated on the aforesaid plats, all of which plats are made a part hereof, so far as our property and/or our rights may be affected by the said proposed highway and/or bridge and the appurtenances thereto belonging, or in anywise appertaining.

The plats that were incorporated into the deed were numbered 8308, 8309, 8310, 8317, 8318 and 9430.

(Cont'd)
them in the Friels' lumberyard; (3) construct flare connections to Route 301 from the right of way; (9) take measures during road construction to prevent flooding of the Friels' property; (5) permit the Friels to designate entrances to the right of way and pave those entrances; (6) keep open the existing entrance to the Friels' property during construction until the new entrances were completed.

Appendix A

Paragraph 5 of the 1952 deed stated:

> AND the Grantors do further grant unto the State of Maryland, to the use of the State Roads Commission of Maryland, its successors and assigns, any and all existing rights whatsoever of the Grantors, their heirs, successors and assigns, to enter the "Through Highway" from their remaining property, except by Melvin Avenue all to the end that there never will be any vehicular, pedestrian and/or animal access to said "Through Highway" except by means of Melvin Avenue and such public road connection as the State Roads Commission may construct, or permit to be constructed.

In addition, Paragraph 12 of the 1952 deed provided:

> AND., we, for ourselves, our heirs and assigns, do further release the State of Maryland and the State Roads Commission of Maryland, their members, officers, agents and employees, from any and all claims or demands, both present and future, for any damages and/or injuries whatsoever caused directly or indirectly by the taking, use or improvement etc. of the land, easements and/or rights etc. for a public highway and/or bridge and their necessary appurtenances, including the creation or extension of slopes, embankments or excavations in connection therewith or any other matters or things, arising out of or caused by the laying out, opening,

> establishing, constructing, extending, widening, straightening, grading, improving, further improving, use and maintenance, etc. of the said State Highway and/or bridge and their necessary appurtenances within the area of the land, easements and/or rights, etc. hereby granted, together with any change of grade therein or drainage therefrom.

Nothing in the deed referred to the construction or maintenance of a cross-over of Route 301 at the intersection with Melvin Avenue, nor did the deed contain language preserving the Friels' rights or interests in the portion of Melvin Avenue intersecting with Route 301.

Construction of Route 301 was completed in the fall of 1955. When completed, the cross-over at Melvin Avenue remained open for the traffic to cross-over both lanes of Route 301, and to make left turns onto Melvin Avenue from either the north or southbound lanes of Route 301.

In the years following completion of the project, the SRC became the State Highway Administration ("SHA"). The SHA collected data demonstrating an increase in traffic accidents, particularly right angle accidents, at the intersections of Route 301 and Melvin Avenue, Del Rhodes Avenue, and Route 18 (the latter two of which are located east and west of Melvin Avenue, respectively).

The SHA decided to improve the highway's safety record by permanently removing the Route 301 cross-over at Melvin Avenue. As a result, cross-over traffic and left turns would

be eliminated at that intersection, but access to the north and southbound lanes of Route 301 from Melvin Avenue would remain open. In addition, the cross-over traffic at Del Rhodes Avenue and Route 18 would be eliminated, but "J turns" would be permitted at those intersections. The SHA notified appellants of the proposed project.

The Lawsuit

On December 26, 2001, appellants filed an eight-count complaint against the SHA and SRC, as well as two individual defendants acting in their official capacities as employees of the State Highway Administration, Parker Williams, State Highway Administrator, and Robert Lindsey, SHA District Engineer.[4] Appellants argued that they possessed a valuable property right in the Melvin Avenue cross-over and that the proposed closure deprived them of their right to be compensated for the fair value of property taken by the State under Article III, §§ 40 and 40B of the Maryland Constitution. Appellants sought relief through mandamus, specific performance, and declaratory judgment. Appellants simultaneously sought a preliminary injunction requesting that the SHA be enjoined from further action on its proposed highway improvements and that appellants be compensated $20,000,000.00 for the unconstitutional taking of their property rights.

---

4. Before trial, the court granted a motion to dismiss the two individual defendants.

Appendix A

Appellants filed a motion for summary judgment on six of its eight counts, and the SHA answered in opposition. By memorandum and order entered on May 31,. 2002, and pursuant to a motion hearing, the court denied summary judgment.

Appellants petitioned for a temporary restraining order ("TRO") and preliminary injunction on July 3, 2002, when the median closure became imminent. By order entered on July 22, 2002, the court denied the TRO. On September 15, 2002, the SHA placed barriers in the median at the Melvin Avenue intersection, effectively closing the cross-over.

On October 22, 2002, the parties appeared for a hearing on appellants' petition for a preliminary injunction. During those proceedings, the parties also presented arguments on the merits of the complaint and submitted to the court a set of stipulated facts. The court did not act on the petition for preliminary injunction.

The matter came on for trial on December 13, 2002. Appellants presented no witness testimony and based their case on documentary evidence. Appellants argued that the documents in the record reflected the parties' intention that the SHA would construct and maintain a cross-over at Melvin Avenue in perpetuity. They pointed to the modification of the Melvin Avenue/Route 301 intersection, reflected by two plats, 8309 and 9430 (amending 8309). The earlier of the two, plat 8309, had included only access to Route 301 from the north side of Melvin Avenue, and not the south side, where the Friel businesses and parking lot were located. Plat 9430, however, shows access points to Route 301 on both the north

and south sides of Melvin Avenue, as well as a cross-over. That modification, argued appellants, reflected the parties' agreement that the SHA would construct and, presumably maintain in perpetuity, the Melvin Avenue cross-over.

In its case, the SHA called, Robert Tressalt, Deputy Director for the Office of Real Estate at the SHA. Tressalt testified that the State does not grant property rights in cross-overs, because changes in traffic over time dictate modifications to medians along its highways. When asked to look at plat 9430, Tressalt stated that the plat showed only that the SHA intended to construct a cross-over at Melvin Avenue "[f]or the time being."

James R. Friel, Jr. was called as a SHA witness and testified that he was a partner in the Friel businesses and one of the owners of the property in dispute. He stated that, except for one 500 square foot remnant, the family no longer owned property on the north side of Route 301.

The SHA argued to the court that the controlling document in this case is the deed recorded on September 17, 1952, and that resort to related documents is done only when the deed contains ambiguous language. The SHA further argued:

> It's very important that we look at those words, access to, not access across. There is nothing in this deed, if you look at the deed, every reference to access is access to, never access across. Indeed, if you look at the next paragraph, they say for the same consideration, they

relinquish and surrender any and all right whatsoever of vehicular access to the highway.

* * *

This is a grantor's deed, Your Honor. There is nothing retained, other than the right to enter the highway at the area designated or that has and was designated as Melvin Avenue.

The SHA asserted that the 1952 deed had conveyed to the State all of the Friels' rights and interests to the property. Had the Friels intended to reserve property rights in the cross-over, the SHA argued, the deed would have stated as much. The SHA also argued that, even though it had constructed and maintained the Melvin Avenue cross-over from 1955 to 2002, the State never granted the Friels the right to the cross-over in perpetuity.

The court entered a memorandum and declaratory judgment on June 18, 2003. In its memorandum, the court determined, with respect to the claims concerning appellants' proprietary interest in the Melvin Avenue cross-over: "We think it clear that, by 'dedicat[ing] and convey[ing in the 1950 Indenture] [the property that became part of Melvin Avenue] to the Town . . . as public property . ,' plaintiffs relinquished all of their rights in the property in exchange for the Town's agreement to construct and maintain a street." And, although the Friels retained a reversionary right to the property on which Melvin Avenue was built, the court determined that the right to reversion was triggered in 1955 when construction on Route 301 was completed. The court

further determined that, pursuant to Md. Code (1974, 1996 Repl. Vol.), § 6-103 of the Real Property Article, the statute of limitations for filing an action for recovery of the land expired on July 1, 1976.

In addition, the court stated:

> Wholly independent of that fact, any interest of [appellants] under the Indenture ceased long before the operation . . . of the statute. While other provisions of the 1952 deed to the State can be said to provide the same result, individually or in combination, the third and twelfth paragraphs contain its most positive and straight forward statement evidencing the extinguishment of [appellants'] rights, whatever their form.[5]

The declaratory judgment stated:

> 1. Reconfiguration of Route 301 has not violated any general, non-contractual property right or interest of [appellants].
>
> 2. [Appellee] ha[s] not violated or abridged any existing contractual right or interest of [appellants] under the 1950 Indenture of Dedication.

---

5. The full text of the third and twelfth paragraphs were set forth in our summary, *supra*.

3. The Deed and Release dated August 15, 1952, established no right or interest which has been violated by (appellee].

4. The complaint contains no facts which indicate that the conduct of (appellee] is in violation of Title 5, Subtitle 7A, of the State Finance and Procurement Article of the Code.

5. Wills, deeds and other instruments submitted by [appellants] in this action contain no constitutionally-protected or other right or interest which has been appropriated or otherwise violated by defendants.

Appellants thereafter filed this appeal.

DISCUSSION

Appellants argue that the court erred by determining that they did not possess a property right in the Melvin Avenue cross-over on Route 301. We discern no error.

It is undisputed that, prior to 1950, the Friels owned the land on which the Melvin Avenue cross-over now exists and that they conveyed that parcel to the Town of Queenstown with a right of reversion. We must therefore decide whether the Friels conveyed that right of reversion to the Melvin Avenue cross-over in their 1952 deed to the State.

At the outset, we note that "'the construction of a deed is a legal question for the court, and on appeal, it is subject

to de novo review.'" *Calvert Joint Venture #140 v. Snider*, 373 Md. 18, 38 (2003) (citations omitted). We apply the principles of contract interpretation in construing a deed. *Chevy Chase Land Co. v. United States*, 355 Md. 110, 123 (1999). The Court of Appeals has stated that "[t]he case law setting forth the general rules of construction of deeds affirms that, 'the court should take into consideration the language employed, the subject matter, and surrounding circumstances,' essentially the deed as a whole." *County Comm'rs of Charles County v. St. Charles Assocs. Ltd. P'ship*, 366 Md. 426, 463 (2001) (citation omitted); *accord Chevy Chase*, 355 Md. at 123 (stating that "we must consider the deed as a whole, viewing its language in light of the facts and circumstances of the transaction at issue as well as the governing law at the time of conveyance"). "Likewise, there is an equal abundance of Maryland case law directing the Court to strongly consider the intention of the parties." *St. Charles Assocs.*, 366 Md. at 463.

Appellants contend that the Friels did not convey their property rights or interests to the Melvin Avenue cross-over in the 1952 deed because they had already conveyed that property to the Town of Queenstown. Therefore, appellants argue, the property rights and interests conveyed to the State in the 1952 deed pertain only to the land within the Right of Way of Through Highway that surrounded, but did not include the Melvin Avenue cross-over.

The State counters that the Friels conveyed, in fee simple, all rights and interests (including reversionary interests) to the property that fell within not only the lines designating the Right of Way of Through Highway, but also the right of way lines within the through highway's boundaries.

The State has the better part of the argument. As we have stated, Paragraph 3 of the 1952 deed recites that the Friels granted and conveyed unto the State of Maryland, "forever in fee simple, all our right, title and interest . . . lying between the lines designated 'Right of Way Line of Through Highway', *and also between the lines designated 'right of way line' as shown and/or indicated on the aforesaid plats, all of which plats are made a part hereof.*" (Emphasis added.) Under Maryland law, "[t]he word 'grant' . . . in a deed, or any other words purporting to transfer the whole estate of the grantor, passes to the grantee the whole interest and estate of the grantor in the land mentioned in the deed unless a limitation or reservation shows, by implication or otherwise, a different intent." Md. Code (2003), § 2-101 of the Real Property Article. Any interest the Friels had in the land, including the right of reverter, was conveyed to the State in the 1952 deed.

Plat 9430 (amending plat 8309 and, together with plat 8309 and others made part of the deed) reflects what the State acquired in the 1952 deed. The plat identifies the future Route 301 with solid lines designated as "Right of Way Line of Through Highway." Melvin Avenue is identified on Plat 9430 as a "Gravel Road," which crosses the northbound and southbound lanes of Route 301 with dashed lines on both sides of the road. In addition, a solid line running through the center of the dashed lines is marked as "Base Line of Right of Way."

The plat does not explain the meaning of a dashed line versus a solid line. Yet, it is evident to us from the words, "Base Line of Right of Way" (which runs through Melvin

Avenue), that the road was considered a right of way. And we are satisfied that the dashed lines in Plat 9430 represent the right of way lines referred to in Paragraph 3 of the 1952 deed. Said differently, the plat reflects that the Friels conveyed not only the land surrounding the Melvin Avenue cross-over, but also any interest they had in the land that constituted the Melvin Avenue cross-over. Moreover, by the express and unequivocal language of the deed—transferring "all right, title and interest" in the land conveyed—appellants conveyed to the SRC their reversionary rights to the Melvin Avenue cross-over.[6]

Appellants ask us to consider the terms of the 1952 deed in conjunction with the Notice-Acceptance of Option executed two years before the 1952 deed. When the language of a deed is clear and unambiguous on its face, as we have concluded the 1952 deed is, the plain meaning of the words govern, so we do not look to extrinsic evidence. *Gregg Neck Yacht Club, Inc. v. County Comm'rs of Kent County*, 137 Md. App. 732, 759 (2001).

But, even were we to assume that the terms of the 1952 deed are not plain and unambiguous and that we should look to the Notice-Acceptance of Option for evidence of the

6. Appellants argue that the 1952 deed could not have included their property rights and interests in Melvin Avenue because the SRC never appropriated that property from the Town of Queenstown. This argument has no merit. The record contains deposition testimony from a real property manager for the SHA, explaining that the State does not "pay [municipalities] for what [it is] acquiring as a public road connection," and, in this case, Melvin Avenue "was not paid for because it was considered to be part of a Queenstown public street."

parties' intention, that document does not assist appellants' argument. In the last section of the Notice-Acceptance of Option, the SRC identified seven items that it understood and agreed to undertake as consideration for acquiring the Friels' property. The second item provided that Melvin Avenue would be connected to the proposed Route 301; the SRC would build a standard cross-over; the SRC would extend the cross-over to the railroad property; and the SRC would grade and surface the extensions of the Melvin Avenue cross-over on either side of Route 301 in accordance with SRC street and road specifications.

Nothing in the option contract, or notice-acceptance thereof, suggests that the Melvin Avenue cross-over was to be continued indefinitely. The SHA agreed to construct the cross-over and extend it on either side, but that agreement, argues the State, did not convey to appellants any property right, much less one in perpetuity.

The SHA's argument is supported by Mr. Tressalt's trial testimony. He stated without contradiction that cross-overs

> are constructed by a permit or permission of the State Highway Administration. That's throughout the state. That's state policy. They're not a permanent right.
>
> * * *
>
> They're permitted and that permit may vary based on traffic needs and situations and safety issues as they come up. That's consistent policy throughout the state. It's not a property right.

In sum, the 1952 deed contained no provision granting appellants a property right in Melvin Avenue. To the contrary, appellants conveyed to the SRC, in fee simple, all of their rights and interests in the property between the right of way of through highway lines and right of way lines. And even if we were to construe plat 9430 and the 1952 deed as ambiguous, and consider the Notice-Acceptance of Option Contract, the State only agreed to construct the cross-over, not continue the cross-over in perpetuity. We agree with the SHA that "[t]he Friels long ago gave up 'the whole bundle of property rights' and have no present proprietary interest in what was Melvin Avenue or any part of U.S. Route 301." The court did not err in so concluding, and we shall not disturb that ruling. Md. Rule 8-131(c).

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANTS.

APPENDIX B — MEMORANDUM OF THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY DATED JUNE 18, 2003

THE CIRCUIT COURT FOR QUEEN ANNE'S COUNTY

Civil #8617

S.E.W. FRIEL et al

v.

STATE ROADS COMMISSION et al

MEMORANDUM

In 1941, S.E.W. Friel, Jr. and James R. Friel acquired a property in the municipality of Queenstown under the will of their father. In the following year, Friel Lumber Company, a partnership of those individuals, acquired two parcels which adjoined the first. This action is brought by that partnership and S.E.W. Friel, another general partnership of the same individuals. The partnerships are hereafter referred to as plaintiffs.[1]

---

1. Attached to the complaint are 5 deeds evidencing conveyance of as many parcels to Friel Lumber. There is no showing how the S.E.W. Friel partnership acquired an interest in any of these properties. Nor is it shown (i) how the original property inherited by the individuals was acquired by either partnership or (ii) the significance of 3 of the deeds attached to the complaint, which involve property acquired subsequent to the time when plaintiffs assert the creation of the rights here involved. However, for reasons to be seen,

(Cont'd)

Appendix B

In 1950, by "Indenture of Dedication," plaintiffs "dedicate[d] and convey[ed] to the Town . . . as public property . . .":

> A street or way leading from the Queenstown-Wye Mills State Road through lands of . . . [plaintiffs] to the lands of the Baltimore and Eastern Railroad Company, said street having a uniform width of 30 feet through . . . [part of plaintiffs' property] and a uniform width of 50 feet wide through . . . [another, part].

As shown on an accompanying plat (attached here as Exhibit A), the new street began on the State road from Queenstown to Wye Mills (Route 456), ran perpendicularly to that road in a southwesterly direction a distance of 231 feet,[2] then southeasterly 274 feet,[3] where it terminated at the division line between plaintiffs and the Baltimore and Eastern Railroad.

The Town accepted the conveyance and "in consideration thereof, covenant[ed] and agree[d] that it will lay out, grade,

---

(Cont'd)

title to the properties of plaintiffs has little relevance to the issues presented in the complaint; and, for present purposes, we assume that one or both of the plaintiff partnerships owned all properties referred to herein. Defendants at no place suggest the contrary.

2. Shown in green on the attached plat.

3. Shown in red on the plat.

construct and maintain a road and sufficient street." The instrument was expressly subject to a "reverter", about which more will be said later (page 7 *et seq.*). The resulting roadway came to be known as "Melvin Avenue."

Construction of Route 301

At or about the same time, the State was in the process of constructing a new highway from the Chesapeake Bay Bridge to the Maryland-Delaware line (Route 301). Plats show the new right-of-way to be 200 feet wide, with two-lane roadways running in opposite directions and divided by a wide median strip. The roadway was somewhat wider at designated intersections by reason of "flare connections,." which provided the only access to and from the highway. Access to the highway was denied, except at those intersections.

Route 301 ran through the heart of plaintiffs' property and included part of Melvin Avenue, shown on State plats as "Gravel ... Right of Way." Part of plaintiffs' property lay outside the boundaries of the highway on the north, but most (if not all) of that seems to have passed into other hands and, in any event, is not discussed in the complaint; and we do not consider it here.[4] The focus of our inquiry is the portion of Melvin Avenue which now lay within the boundaries of

4. At an inspection attended by counsel, we determined that this northern property — to the extent, if at all, to which it is still owned by plaintiffs — involved none of the operations on the southerly side of the highway and was not related to any of them.

Route 301 and the large portion of plaintiffs' original property which lies to the south of Route 301.[5]

One of the places providing access to the new highway was Melvin Avenue, which gave entrance on the north at the point where it intersected that side of the highway and on the south at the corresponding point where it intersected the south line of Route 301 (which now formed the northern boundary of plaintiffs' property here involved). Between these 2 points, the plats contain the original outlines of Melvin Avenue as "Gravel ... Right of Way." Part of the red-shaded, portion at the northerly end of Melvin Avenue now constituted part of the westbound (northernmost) lane of the new highway, another part was within the median strip, and another part within the eastbound lane of the highway.[6] During construction of the highway, the grass median was interrupted by paving of the area formerly within the lines of Melvin Avenue. As a practical matter, Melvin Avenue traversed Route 301 within its original boundaries.

After extended and somewhat complicated negotiations, by "Deed and Release" dated August 15, 1952, plaintiffs conveyed to the State of Maryland, to the use of the State Roads Commission of Maryland (collectively, the State) all of their property which lay within the lines of the new

---

5. The original property and the five parcels referred to in footnote 1 all lie to the south of Route 301.

6. In other words, all of the green-shaded part and parts of the northerly and southerly ends of the red-shaded part of Melvin Avenue lay outside the boundaries of the new highway.

highway. As this instrument is the basic source of contention here, we postpone further discussion of it.

Reconfiguration of Route 301

In its complaint, filed December 26, 2001, plaintiffs reported that the State "proposes to eliminate crossover traffic at 3 points along Route 301 in the Town of Queenstown and only permit what it terms 'J' turns at these locations." The complaint reported that the State "represented to the public . . . that the J-turns will improve traffic safety because traffic that presently crosses over Route 301 or turns left at these intersections crosses in front of oncoming traffic, resulting in what the . . . [State] terms 'T-bone' collisions, resulting in death or serious bodily injury, and that this will be eliminated by J-turns."[7] As part of the process, the Melvin Avenue intersection was to be closed, although entrance to the previous entrance to plaintiffs' property via Melvin Avenue from eastbound Route 301 was unaffected.[8] However, access between the north and south sides of Route 301 was to be by means of J-turns at Route 456, several hundred yards to the east of Melvin Avenue.

---

7. The primary effect of the J-turn was to restrict, if not prohibit, direct passage between the north and south sides of Route 301, although it did permit vehicles traveling on that highway to make left turns within concrete channels and thus cross the lanes of oncoming traffic to reach the other side of the highway. In short, traffic on Route 301 was largely unaffected.

8. We note parenthetically that plaintiffs had also acquired additional access directly from Route 456 by reason of acquisition of properties lying within the blue hatched area to the east of the red-shaded area on the plat.

Appendix B

General deprivation of convenient access

The first count of the complaint is predicated upon allegations that the State "has failed to design or purchase sufficient land to construct a proper width median to permit the type of turn whereby tractor trailers and large trucks complete a u-turn entirely within the median area and re-enter the highway directionally aligned with oncoming traffic." The result was said to be that "this project ... will eliminate and/or substantially restrict the right and ability of the Plaintiffs to continue to have tractor trailers and other large trucks deliver materials to its premises and permit it to ship its goods and products, the result of which will be to eliminate the ability of the Plaintiffs to continue to transact any business upon the premises." The legal proposition is that "eminent domain does not permit an otherwise lawful compensated taking to occur when the underlying actions of the government are arbitrary and capricious." Mandamus is sought to compel the State to cease its operations.

The second count is premised upon the belief that, "in closing the crossovers ... the Defendants are taking and appropriating a property right of the Plaintiffs." Mandamus io sought to compel the State to value and pay the fair market value of the property alleged to be taken.

Unlike other counts of the complaint, these allegations are based solely upon supposed general rights of property owners at the time when changes are made to a highway. The situation in *Langley Shopping Center, Inc. v. State Roads Com.*, 213 Md. 230, 232, is virtually identical to that here: "the State Roads Commission ... is reconstructing New

Hampshire Avenue into a divided four-lane dual highway in front of both of the properties of the appellants. It is about to construct in the center of this highway what is called a 'median strip', made of concrete, which divides the northbound and southbound lanes in such a manner that traffic in the southbound lanes cannot cross the northbound lanes, and vice-versa, except at openings in the median strip divider. The openings in the median strip will be beyond the appellants' properties and thus left turns cannot be made directly into the appellants' shopping centers."

The Court held, at 237, that "construction of the median dividers does not constitute a taking of the plaintiffs' property within the constitutional meaning of the term and hence that the Commission is not bound to pay damages to the abutting landowners", explaining (at 236):

> It seems to us entirely reasonable that if the State could divert traffic entirely away from the plaintiffs' corners without being liable for damages for doing so, it may, in the interest of safety, and without incurring liability for damages, interpose an obstacle which may render access to the plaintiffs' properties less easy but which does not actually or virtually destroy the plaintiffs' access to the highway. An opposite view would require the State to pay through the nose for the privilege of further improving and adding to the safety of highways which it has built and which have evidently brought customers to the doors of the owners of land fronting on such highways.

The decision was followed in *Turner v. State Roads Com.*, 213 Md. 428, 436-437

We are not unmindful of the specific evils which plaintiff alleges in the first count. However, to the extent that *Langley* does not itself[9] deal with that situation, such is to be found in its extensive quotation of the earlier case of *Krebs v. State Roads Comm.*, 160 Md. 584, in which "the State Roads Commission eliminated a highway grade crossing over a railroad and relocated it so that the road distance from the appellants' store to a nearby village was greatly increased. There the appellants alleged that eighty per cent of the trade of their store came from the village on the other side of the grade crossing and that much of the trade came to their store because of its proximity to the village; that the removal of the old grade crossing and the corresponding interruption of the highway at that point would cause great inconvenience and would result in a loss of the property's usefulness, value and business worth, and that this action amounted to a taking of property in a constitutional sense without compensation."

In *Krebs*, the Court held (160 Md. at 590):

> Correct though it may be to say that the surrender or vacation of the public easement there will diminish values in the neighboring abutting properties, or damage businesses carried on in them, this, it seems, cannot mean that the owners will lose any right other than, or in addition to, the right to travel across the tracks, which has been included and secured to them in the public easement. Their right has been only that secured

9. Plaintiffs there argued that "the median strips will cause them to lose approximately one-half of their business from motorists who are said to constitute 95% of the plaintiffs' customers."

> to the public as a whole, even though by reason of the location of their properties it is of greater usefulness to them than to others of the public. The question under the Constitution is not one of comparative usefulness, or loss, to one property or the other from the shifting of the crossing, but one of taking private properties in doing it. And in the opinion of this court *the mere surrender of the easement of crossing at the former site, whatever may be the inconvenience or loss resulting to owners of the nearby properties, cannot be regarded as involving a taking of those properties*. [Emphasis in original]

These authorities make it clear that plaintiffs have no cause of action on the basis of facts alleged in the first and second counts of the complaint.

Violation of State policy

The fifth count alleges violation of the "State Economic Growth Resource Protection and Planning Policy contained in Subtitle 7A, Title 5, State Finance and Procurement Article, Md. Code," by reason of "The effect . . . to divide the Town of Queenstown into two parts whereby access from one part of the Town will be completely or practically eliminated to the other part of the Town." Mandamus is sought to preclude use of State funds for the crossover project.

It is perfectly clear that plaintiffs assert no rights other than those held by the general public, and so have no standing to present this claim. Furthermore, it is not alleged or shown

either that (a) "the project is not consistent with: (i) the State Economic Growth, Resource Protection, and Planning Policy established in §5-7A-01 ... or (ii) the local plan of the jurisdiction in which the project is located" (§5-7A-02 (a)(1)) or (b) that the State has not determined that "extraordinary circumstances exist that warrant proceeding with tile project and that no reasonably feasible alternative exists" (§5-7A-02.(a)(2)).

No cognizable claim exists under the fifth count.

The proprietary interest

Counts Three and Four of the complaint assume that plaintiffs hold a propriety interest in Melvin Avenue by reason of the 1950 Indenture of Dedication to the Town and/or the 1952 Deed to the State.

The third count seeks a writ of mandamus on the basis of a right or interest by virtue of the 1952 deed to the State, which is said to contain an agreement that plaintiffs "would be permitted to maintain a valuable property right, i.e. access from its premises to Melvin Avenue." Similarly, the fourth count seeks specific performance of the State's alleged agreement in the 1952 deed "which provides that the Plaintiff [sic] will not be denied access to Melvin Avenue."[10]

---

10. Even assuming such an agreement, the suggestion that there has been a breach of it is literally and practically incorrect. Access to plaintiffs' property was "by means of" Melvin Avenue. See the discussion on page 11.

Our inquiry, therefore, involves confirmation of the existence and scope of the supposed right.

The Indenture of Dedication[11]

We have to some degree discussed the 1950 "Indenture of Dedication" on page 1, *supra*. Specifically, by its provisions:

> . . . the parties of the first part [plaintiffs] do hereby dedicate and convey to the Town of Queenstown . . . as public property, a strip of land across he premises of the parties of the first part in the said Town . . . for the purposes of a public street and/or highway for the use of the public. [emphasis supplied]

We think it clear that, by "dedicat[ing] and convey[ing] . . . [Melvin Avenue] to the Town . . . as public property . . . ," plaintiffs relinquished all of their rights in the property in exchange for the Town's agreement to construct and maintain a street. This conclusion is based upon several considerations. First, and perhaps most importantly, is the form of the grant itself. By § 2-101 of the Real Property Article, "The word 'grant', the phrase 'bargain and sell', in a deed, or any other words purporting to transfer the whole estate of the grantor,

---

11. This instrument was not included among the exhibits filed with the complaint, and is not referred to in the complaint itself. However, it was included in the stipulation on which the matter was submitted and was frequently referred to in the subsequent hearing — if only to provide the basis for the interest allegedly given in the later Deed and Release.

passes to the grantee the whole interest and estate of the grantor in the land mentioned in the deed unless a limitation or reservation shows, by implication or otherwise, a different intent." See also, §§4-101 and 4-202 (a). In the context of these statutes, use of the unqualified word "conveyed," the statement of the Town that it "accepts said *conveyance* and dedication [emphasis supplied]" and the statement that the property was being acquired by the Town "as public property" suggest nothing more or less than that plaintiffs were relinquishing all rights which it had to the property.

Clearly, there is a contrary suggestion in the provision that:

> If the said dedicated street and/or highway is abandoned or discontinued in whole or in part or ceases to be a Town maintained street and/or highway, it shall revert to the [plaintiffs] or their estate or their heirs.

What the instrument refers to as a "reverter" is in legal terms a mere possibility of reverter and involved no present estate or title in plaintiffs. "[A] possibility of reverter is not created into an estate by a will or a deed, but is merely a possibility of acquiring an undisposed of estate." *Ringgold v. Carvel*, 192 Md. 262, 272. As the Court of Appeals there continued:

> A possibility of reverter is any reversionary interest which is subject to a condition precedent. 2 Restatement, Property, sec. 154. When the owner of an estate in fee simple absolute transfers an estate in fee simple determinable, the transferor

> has a possibility of reverter. In other words, if one who has an estate in fee simple creates a determinable fee in another, he has thereafter merely a possibility of reobtaining the land by reason of the occurrence of the indicated contingency. Thus, where land is devised for a certain purpose, and it is the testator's intention that it shall be used for that purpose only, and that on the cessation of such use, the estate shall end without re-entry by the grantor, a possibility of reverter arises. At common law *such a right is not an estate, present or future, but is a mere possibility of acquiring an estate, and is not devisable or assignable.* The Maryland cases dealing with possibilities of reverter are mainly those in which land has been devised for a specified purpose, such as for a church, school or burial ground. [emphasis supplied][12]

Plaintiffs acquired no right or interest by reason of the Indenture of Dedication, although they did hold a *possibility* of reverter upon the happening of one of the conditions

12. On the other hand, "A reversion is any reversionary interest which is not subject to a condition precedent. 2 Restatement, Property, sec. 154. It is the residue of an estate left in the testator to commence in possession after the determination of some particular estate devised by him. Hence, a reversion arises whenever the owner of real estate devises or conveys an interest in it less than his own. *The logical conception of it in the common law is that it is a return by operation of law to the owner of a portion of that which he owned before and in reality had never lost.* Thus, where a contingent remainder in fee is created by a devise, the reversion in fee is in the testator's heirs or residuary devisees until the remainder vests [emphasis supplied]." *Id.*

expressed in the Indenture, that is, if the road were "abandoned or discontinued in whole *or in part or ceases to be a Town maintained street and/or highway* [emphasis supplied].

The alternative cause of reverter occurred when the part of Melvin Avenue within the boundaries of Route 301 ceased to be a Town maintained street at least upon completion of that highway in 1952.[13] Under that circumstance, *Code*, Real Property, §6-103, provides that:

> No person may commence an action for the recovery of land, nor make an entry on it, by reason of a breach of a condition subsequent, or by reason of the termination of an estate of fee-simple determinable, unless the action is commenced or entry is made within seven years after breach of the condition or from the tithe when the fee-simple determinable estate terminates. *If a breach of a condition subsequent or termination of a fee-simple determinable estate occurred prior to July 1, 1969, an action may be commenced for the recovery of the land, or an entry may be made on it, by the owner of a right of entry or possibility of reverter by July 1, 1976.* Possession of land after breach of a condition subsequent or after termination of an estate of fee-simple determinable is adverse and hostile from the first breach of a condition subsequent or from the occurrence of the event

13. From all appearances, the same can be said of the remnant of Melvin Avenue which is adjacent to plaintiffs' property on the south side of Route 301.

terminating the fee-simple determinable estate. [Emphasis supplied]

In this action, a breach occurred when the Town ceased to maintain the portion of Melvin Avenue within the boundaries of Route 301; and "the failure of a special limitation, such as a possibility of reverter, results automatically in the reversion of an estate to the original grantor in fee simple absolute without the need for entry" (*Knights & Ladies v. Board of Educ.*, 113 Md. App. 656, 665, citing *Ocean City v. Taber*, 279 Md. 115, 128). Having occurred prior to July 1, 1969, the time for bringing an action to regain possession expired July 1, 1976. Plaintiffs have no present rights with respect to the Indenture of Dedication. *Knights & Ladies, supra.*

Wholly independent of that fact, any interest of plaintiffs under the Indenture ceased long before the operation of the statute. While other provisions of the 1952 deed to the State can be said to provide the same result, individually or in combination, the third and twelfth paragraphs contain its most positive and straightforward statement evidencing the extinguishment of plaintiffs' rights, whatever their form:

> [¶3] ... [plaintiffs] do hereby grant and convey unto ... [the State], forever in fee simple, *all our right, title and interest*, free and clear of all liens and encumbrances, in and to the land, together with the appurtenances thereto belonging, or in anywise appertaining, lying between the lines designated 'Right of Way Line of Through Highway', and 'right of way line' as shown and/

or indicated on the aforesaid plats, all of which plats are made a part hereof, *so far as our property and/or our rights may be affected by the said proposed highway and/or bridge and the appurtenances thereto belonging, or in anywise appertaining* [Emphasis supplied]..[14]

. . . . . .

[¶12] . . . [Plaintiffs] for ourselves, our heirs and assigns, do further release the State . . . their members, officers, agents and employees, from any and all claims or demands, both present and future for any damages and/or injuries whatsoever caused directly or indirectly by the taking, use or improvement, etc. of the land, easements and/or rights etc. for a public highway and/or bridge and their necessary appurtenances, including the erection nor maintenance of slopes, embankments or excavations in connection therewith or any other matters or things, arising out of or caused by the laying out, opening, establishing, constructing, extending, widening, straightening, grading, improving, further improving, use and maintenance etc. of the said State Highway and/or bridge and their accessory appurtenances within

14. As if for emphasis, the fourth paragraph of the deed echoes the grant: quoted above: "And . . . [plaintiffs] do further grant unto . . . [the State] in fee simple, all of the land and premises lying between the lines designated `Right of Way Line". This language clearly created an unencumbered fee simple interest in the State. *See*, Real Property, §§2-101, 4-101, 4-102, and 4-202 (a).

> the areas of the land, easements and/or rights, etc. hereby granted, together with any change of grade therefrom or drainage therefrom. [Emphasis supplied]

Whether viewed as the result of a grant, a release or a loss of rights by reason of the expiration of the statute of limitations, plaintiffs have no present rights under the 1950 Indenture of Dedication.

The Deed and Release

Of the 14 other paragraphs of the 1952 deed, nine have no conceivable bearing upon plaintiffs' property interests in the Melvin Avenue intersection;[15] and one (¶ 15) duplicates another (¶ 5). From our standpoint, the critical provisions are those quoted above and those to be found in paragraphs 5 and 6, which deal with access.

Paragraph 5 provides that:

> AND the Grantors do further grant unto the State ... any and all existing rights whatsoever of the Grantors, their heirs, successors, and assigns, to enter the 'Through Highway' from their

15. A preamble setting forth the State's project (¶s 1 & 2); plaintiffs' abandonment of title to scales and weighmaster shed (¶s 7 & 14); establishment of setback areas adjacent to flare connections (¶s 8 & 13): creation of easements for drainage over plaintiffs' remaining land (¶s , 10 & 11); standard covenants of special warranty and further assurances (¶ 16); and a moribund provision for release of liens (¶ 17).

> remaining property, except by Melvin Avenue all to the end that there never will be any vehicular, pedestrian and/or animal access to said 'Through Highway' except by means of Melvin Avenue and such public road connection as the State . . . may construct, or permit to be constructed.

Paragraph 6 makes similar provisions specifically applicable to the "flare connections".[16]

We first note that paragraph 15 involves an almost direct quotation of paragraph 5, *except* for the fact that it makes no reference whatever to Melvin Avenue or other specific place of access. From this, we agree with plaintiffs that the more specific references to Melvin Avenue in the fifth paragraph were intended to have some special meaning not included within the general phrase "the end that there never will be any vehicular, pedestrian and/or animal access to said 'Through Highway' except such public road connection as the State . . . may construct or permit to be constructed."

In a very real and literal sense, after reconfiguration of the intersection, access between plaintiffs' property and Route 301 is "by means of Melvin Avenue." It will be remembered that Melvin Avenue ran from a point now north of Route

---

16. "[Plaintiffs] . . . forever relinquish and surrender any and all right whatsoever of vehicular access to the highway across the flare connections . . . between the existing Melvin Avenue in Queenstown as shown on right of way Plats 8309 and 9430 and the right of way line of the Through Highway to the end that there will never by any means of vehicular access to and from the property abutting the right of way along said flare connections.."

301 in a southerly direction to a terminus at the property of the railroad. State highway plats contained in the record indicate that the railroad lies below, but not adjacent to, the southern end of the right-of-way line of Route 301. Ergo, the southernmost leg of Evans Avenue still exists and in fact furnishes ingress and egress to plaintiffs' property.

Plaintiffs make no mention of that fact. Instead, they contend that the words "by means of Melvin Avenue" should be read as meaning "by means of all of Melvin Avenue as it existed after the deed of dedication in 1950" and thus includes all parts of that roadway subsumed in Routs 301. Consequently, they argue, this language established a right and interest in plaintiffs which is breached by reconfiguration of part of that original right-of-way, We are unable to concur in that proposition.

First of all, as quoted above, references in the fifth paragraph to Melvin Avenue are given only in terms of (i) plaintiffs' rights "to enter the 'Through Highway' from their remaining property "and (ii) "vehicular, pedestrian and/ or animal access to said 'Through Highway' "No other part of Melvin Avenue is mentioned, nor is mention made of ingress or egress any property mentioned, except those of plaintiffs and the State. Actually, the deed does suggest the possibility of access at "and such public road connection as the State . . . may construct, or permit to be constructed." Again, however, the provision speaks only in terms of passage between the properties of plaintiffs and the State; it says nothing whatever of plaintiffs' access to other parts of Melvin Avenue.

Appendix B

Given the sweeping language of the grant to the State (page 10); the sweeping and unqualified release of past and future claims by plaintiffs (paragraph 12, quoted on page 9) and the complete absence of reference to any part of Melvin Avenue, except its intersection with plaintiffs' property, we conclude that the deed of 1952 reserved or conferred no proprietary rights with respect to the use of Melvin Avenue at any other place.

s/ John W. Sause, Jr.
John W. Sause, Jr.
Chief Judge

June 18, 2003

APPENDIX C — ORDER OF THE COURT OF APPEALS OF MARYLAND DENYING PETITION AND SUPPLEMENT DATED NOVEMBER 12, 2004

IN THE
COURT OF APPEALS
OF MARYLAND

Petition Docket No. 332
September Term, 2004

(No. 1096, Sept. Term, 2003,
Court of Special Appeals)

S.E.W. FRIEL, et al.

v.

STATE ROADS COMMISSIONS, et al.

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, the supplement and the answer filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and supplement be, and they are hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert M. Bell
Chief Judge

DATE: November 12, 2004